Supreme Court, U.S.
FILED
JUN 25 1998
OFFICE OF THE CLERK

No. 97-1748.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ALFRED RASO, ET AL.,

Petitioners,

v.

MARISA LAGO, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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16 pp

QUESTIONS PRESENTED

I. Whether the state agency charged with interpreting M.G.L. c. 121B, § 49, as well as the lower federal courts were correct to interpret M.G.L. c. 121B, § 49 such that the petitioners do not have a right to absolute preference in all the units at West End Place because it was financed largely by federal housing money.

II. Whether the respondents' decision to market units within West End Place to the general public so as not to frustrate the purposes of federal housing law deprived the petitioners of a "right" to absolute preference in the West End Place.

LIST OF PARTIES

PETITIONERS:

ALFRED J. RASO, JOAN BELINSKI CALABRO, FRANK LEVINE, THEODORE RICHARD NEDD on behalf of themselves and all other displaced persons from the West End of Boston, and THE OLD WEST END HOUSING CORPORATION.

RESPONDENTS:

State Respondents
MARISA LAGO, Director of the Boston Redevelopment Authority and the BOSTON REDEVELOPMENT AUTHORITY

Federal Respondents
HENRY CISNEROS, Secretary of HUD, and the DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Municipal Respondents
THOMAS M. MENINO, Mayor of the City of Boston, the CITY OF BOSTON, VICTORIA L. WILLIAMS, Director of the Boston Fair Housing Commission, and BOSTON FAIR HOUSING COMMISSION

Developer Respondents
ROBERT H. KUEHN, JR., President of Keen Development Corporation, and as trustee of the LOWELL SQUARE NOMINEE TRUST, and KEEN DEVELOPMENT CORPORATION; and THE REVEREND MICHAEL F.

GRODEN, Director of the Planning Office of Urban Affairs, Inc., and THE PLANNING OFFICE OF URBAN AFFAIRS, INC., and LOWELL SQUARE ASSOCIATES, JOINT VENTURE; and LOWELL SQUARE COOPERATIVE LIMITED PARTNERSHIP; and MARK MALONEY, President of Maloney Properties, Inc., and MALONEY PROPERTIES, INC.

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STATEMENT OF THE CASE

Municipal respondents are satisfied with the Petitioner's statement of the case and prior proceedings. Pursuant to Supreme Court Rule 15 those sections are not repeated in this brief.

SUMMARY OF THE ARGUMENT

The respondents submitting this brief in opposition are: the City of Boston; Thomas M. Menino as he is the Mayor of the City of Boston; Victoria L. Williams as she is Director of the City of Boston's Fair Housing Commission; and the City of Boston Fair Housing Commission. These respondents are in fact one legal entity which is the City of Boston, a municipal corporation under the laws of the Commonwealth of Massachusetts. For brevity, these respondents will be referred to as the municipal respondents.

The municipal respondents respectfully oppose the issuance of a writ of certiorari to the United States Court of Appeals for the First Circuit for reasons more fully expressed in the argument following this introduction. The primary reason why this Court should not grant certiorari is that the petitioners were not deprived of a "right" to a preference in federally subsidized housing because the very state statute which provides for that preference also subordinates that preference to "conditions as are deemed necessary to carry out the purposes of . . . federal legislation or regulations under which loans, grants or contributions have been made . . . ." M.G.L. c. 121B, § 49(d). Even without this explicit condition in the statute, the Supremacy Clause would have subordinated the petitioners' preference to federal legislation and regulations.

Federal housing money was used to develop West End Place and to offer many of its units at subsidized rates. The "purpose" of federal fair housing legislation and regulations is to offer equal opportunity for all to the benefit of subsidized housing. To achieve this purpose, it is a requirement of federal law for developers to adopt an Affirmative Fair Housing and Marketing Plan (AFHMP). The trial court in

this case made this determination of law and the petitioners have never appealed this issue. (Rec. Ap. 29d) The purpose of affirmative housing regulations is to encourage people to explore housing opportunities in areas they would not ordinarily consider because of location.

In any event, pivotal to the petitioners' argument is their contention that they had an absolute right of preference to all units at West End Place. The state law is clear that petitioners had no such preference. Unfortunately, a lot of ink has been wasted addressing petitioners mantra that "but for" being considered white they would have a preference to all units within West End Place. Petitioners' argument is wrong. The real issue is that the petitioners may have had a preference "but for" federal legislation and regulations requiring equal housing opportunity for the public at large and promoting housing access for persons who would not ordinarily apply for housing but for location. It is obvious that the preference sought by petitioners is extinguished by operation of M.G.L. c. 121B, § 49(d) because such preference is contrary to the very "purpose" of federal legislation and regulations.

This case concerns an ad hoc decision by the governmental respondents to simply adhere to the purposes of federal housing law because the money used to develop the housing units was, for the most part, federal housing money. There is no conflict between the decision of the Court of Appeals for the First Circuit in this case and any other decision in any other circuit or state. This Court should deny the plaintiffs' petition for certiorari.

ARGUMENT

I. THE PLAINTIFF-PETITIONERS CLAIMED "RIGHT" TO ABSOLUTE PREFERENCE TO ALL UNITS IN THE FEDERALLY FUNDED WEST END PLACE DOES NOT EXIST UNDER THE LAWS OF MASSACHUSETTS.

The petitioners do not challenge the lower court decision that the "rights" petitioners claim under the M.G.L. c. 121B, § 49 are qualified by the overriding federal requirements of fair housing law, as explicitly stated in M.G.L. c. 121B, § 49(d). *Raso* v. *Lago*, 135 F.3d 11, 18 (1998) (App. 77a). Further, the petitioners did not challenge the trial court's interpretation of that statute on appeal in the First Circuit. The trial court found that petitioners' rights were illusory because those rights were subordinate to the purpose of federal housing legislation and regulations. *Raso* v. *Lago*, 958 F. Supp. 686 (D. Mass. 1997). (App. 77d and 46a-47a). Petitioners argue in their petition to this Court that M.G.L. c. 121B, § 49(c) is a race neutral statute and is not unconstitutional or presumptively unfair, therefore the statutory preference ought to stand. (Pet. pg. 19). Petitioners cite *Personnel Administrator of Mass.* v. *Feeney*, 442 U.S. 256 (1979) to support their position. Petitioners' argument is misplaced because the court in this case did not strike or invalidate a state law. Rather, the court correctly viewed clauses (c) and (d) as in *pari materia*. The court merely read the plain language of M.G.L. c. 121B, §§ 49(c) and (d) as not providing the petitioners with the benefit of absolute preference to the units at West End Place. 135 F.3d *at* 18.

The trial court offered a detailed analysis of the correct interpretation of M.G.L. c. 121B, §§ 49(c) and (d) and found that the respondent BRA is the state agency charged with

administering that statute and the BRA interpreted § 49(d) as qualifying and limiting the preference given in section (c). The trial court found the BRA's interpretation of the statute not only reasonable but right. By making its own judgment on the interpretation of state law, the trial court made any questions regarding the degree of deference to be accorded to the BRA's interpretation immaterial. *See* 958 F. Supp. at 698. The petitioners have never challenged this interpretation of the statute. Indeed, no reasonable challenge to this interpretation of the statute can be made.

In plain language the petitioners do not have a constitutionally protected "right" to preference in all units within the West End Place development. Therefore, the petitioners cannot claim that this "right" to absolute preference was taken away from them.

II. THERE WAS NO RACIAL CLASSIFICATION IN THIS CASE.

The majority opinion of the panel in the First Circuit found no racial classification, as this term is understood in the context of civil rights litigation, present in this case. As explained by the First Circuit:

> Despite the use of the "racial classification" label, the complaint alleges no *facts* that would bring that label into play. The term normally refers to a governmental standard, preferentially favorable to one race or another, for the distribution of benefits. Yet under the plan adopted in this case, **the apartments freed from the statutory preference are**

> **apartments available to all applicants regardless of race.**
>
> West End Place was built with federal help and its apartments made especially desirable through federal subsidies. It might not seem remarkable that the government should insist, as a condition of this investment, that a fair number of apartments should be effectively open to application by tenants of all races. Nor have we been able to find any case where the government has been required to show a compelling interest, or narrow tailoring of remedies, for a condition framed so as to secure *equal* treatment of applicants regardless of race. (citations omitted) (italics in original, boldface supplied) 135 F.3d *at* 16.

The glaring flaw in the petitioners' argument is that petitioners view the government respondents' concern that federal law requires an AFHMP be used for providing equal access to all people to federally financed housing as a "racially motivated" decision which warrants strict scrutiny. (pet. pg. 17). Under petitioners' reasoning all decisions under civil rights laws would become suspect even if that decision was only to adhere to federal requirements that housing be marketed to the general public in a race neutral fashion.

Addressing this flaw in petitioners' reasoning the majority opinion of the First Circuit panel noted "the plaintiffs are mistaken in treating 'racial motive' as a synonym for constitutional violation. Every anti-discrimination statute aimed at racial discrimination and every enforcement measure taken under such a statute, reflect a concern with race. That does

not make such enactments or actions unlawful or automatically "suspect" under the Equal Protection Clause". 135 F.3d *at* 16.

There was no "racial classification" in this case in the sense that term is understood in civil rights litigation as "reserving benefits to a favored race" or "an effort to segregate the races". *Id. at* 17 (citations omitted). This case is simply, very simply, about reasonable governmental officials being dutiful to the highest laws of this nation. The concern in this case was to follow the law which commands that all people, regardless of race, shall have the equal opportunity to partake in a government program covered by the Fair Housing Act. Petitioners are wrong to argue that racial concerns were involved or that respondents' decision is subject to strict scrutiny analysis.

It may well be that all civil rights legislation is enacted with concern for race as well as ethnicity, religion, sexual orientation, people with disabilities, and other prejudices which interfere with equality and justice for all. It is evident that the Fair Housing Act was enacted to address some of these concerns. See generally, 114 Cong. Rec. 2279 & 9591. In this case however, the motive of the municipal respondents was simply to adhere to federal law which, among other things, requires an AFHMP.

The trial court specifically found that ". . . the AFHMP does not provide for consideration of race in establishing priorities or assigning units . . . priority for the assignment of units is, under the AFHMP, established by a lottery which does not take race into account . . . no one will be assigned a unit in whole or in part because of his or her minority status". 958 F. Supp. at 698 (Pet. App. at 34a).

On the subject of racial classification mention should be made of Judge Stahl's dissenting opinion in this case. Judge

Stahl read into the Complaint the allegation that the "preference to all units at West End Place was not given because the petitioners are white but would have been given if the petitioners were black". 135 F.3d *at* 19. That allegation is contrary to the law and the record in this case. The First Circuit majority opinion correctly cited the laws and regulations applicable to the federal funding for the West End Place including: 42 U.S.C. § 1437f (1994) (subsidies for low-income units); 24 C.F.R. §§ 1.5-5.105 (1997) (requiring funded projects to comply with federal fair housing requirements); 42 U.S.C. §§ 3601-3619 (1994) and 24 C.F.R. §§ 200.660-200.640 (1997). 135 F.3d *at* 13, 14 *and* 16. It is a grievous mistake for Judge Stahl to read into the Complaint the allegation that if the West Enders were black they would have a full preference to West End Place units because such an outcome would be contrary to the fair housing laws. The trial court and the BRA determined that M.G.L. c. 121B, § 49(d) subordinates the preference given in § 49(c) because the purpose of federal fair housing law is to allow equal access to all people. That interpretation of Massachusetts law is correct and has nothing to do with whether the plaintiffs are, as a group, identified as black, white, or diverse.

It seems Judge Stahl was somewhat swayed to read this allegation into the Complaint because the provisions of the Consent Decree (App. pp. 1a-17a) speak of legal remedies to address needs of minorities. However, unlike the fair housing provisions, supra, the Consent Decree concerned a private action by a class of minorities. Therefore, the remedies were geared to remedy damage done *to that class*. The dissent noted that "the consent decree operates only in favor of racial and ethnic minorities . . ." *Id. at* 19. To a large degree, this is correct. However, even the Decree is mindful of the broader implications of federal fair housing laws when it

requires owners and operators of government-assisted housing to pursue affirmative fair housing marketing policies in soliciting buyers and tenants; and that "nothing herein shall constitute or be construed as requiring a quota." [Decree II.B.2.(d)] Clearly, federal fair housing laws, under which the Consent Decree was brought, is the overriding authority and does not limit protections to racial or ethnic minorities. That body of law protects all citizens. It is respectfully suggested that the dissent may have incorrectly read into the Complaint an allegation which is contrary to the facts and to prevailing law. The fact is that the claim of the former West Enders to preference for 100% of the units at West End Place is not legally sound because fair housing laws require equal housing opportunity and do not permit public officials and property owners to limit eligibility or preference for tenancy in government-assisted housing solely to former or current residents of any neighborhood or community, regardless of race.

It should be noted that the former West Enders were granted preference for 55% of the units at West End Place. This resulted because the municipal respondents were empathetic to the plight of the West Enders and attempted to accommodate the concerns of the West Enders while adhering to the obligations of the federal housing laws. The 55% preference resulted from the attempt to mediate this issue. *See, Raso* v. *Lago*, 135 F.3d 11 (1998).

CONCLUSION

For all the foregoing, the municipal respondents oppose the petition for writ of certiorari to the First Circuit Court of Appeals.

Respectfully submitted

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